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THE
AMERICAN LAW REGISTER.

JANUARY 1880.

PROPERTY IN CHURCH-PEWS, MARKET-STALLS
AND LOTS IN CEMETERIES.

THE law relating to the acquisition of property by religious societies, is a subject upon which volumes have been written and numberless decisions rendered, and as to which the local laws of the different states vary very materially. The restrictions as to the amount of property which they may hold, its value and annual income, are greater in some of the states than in others. The manner of acquisition is also a matter regulated by the constitutions and laws of the respective states. These restrictions are the consequences of the old English Statutes of Mortmain, which, originating with the great charter of Henry III., and running through subsequent reigns with various changes rendered necessary by the subtle constructions given to them by the ecclesiastical jurists, have outlived the feudal age which gave them birth, and are felt even in this country at the present time. It is not the purpose of the writer to attempt to go into an examination of that subject, but to give in a concise form the law as to the nature and extent of the tenure which individuals may possess in that species of church property known as "pews." The subject of market-stalls is also included in this paper, because the rights of the holders of that species of property are analogous to the rights of holders of pews. The subject of lots in cemeteries will be hereafter considered.

I. Pews were not used in the English churches until long after the Reformation, probably about the middle of the seventeenth century,

and the manner of acquiring a right to them was very different from what it is in this country to-day. Blackstone speaks of the right to sit in a pew as being a personal one, descending by immemorial custom from ancestor to heir, in the nature of an heirloom, free from ecclesiastical concurrence. Chitty, in his General Practice, says, that it is an incorporeal interest in real estate, giving to the holder of the pew the right to use it for the purposes of divine service. That the right to occupy a particular pew arose either by prescription as appurtenant to a messuage, which presupposed a faculty, or from an actual faculty or grant from the ordinary, in whom existed the right to make disposition of all the pews not already claimed by prescription: 1 Gibson's Cod. 221; 1 Phill. 316; *Corven's Case*, 12 Rep. 105; *Fuller v. Lane*, 2 Add. 247. A distinction was also made between the right to occupy a seat in the body of the church and one in the aisle or chancel; in the former case it being necessary that the right should rest upon a prescription *appurtenant to a messuage in the parish*. The same rule applied to a faculty, which was a grant from the ordinary to the parishioners, who were then placed, according to rank and station, by the churchwardens.

Best, in his Law of Presumptions, says, that by the general law and of common right, there is no such thing as property in pews; that they are for the use and accommodation of the parish at large; that it is only in the light of an *easement* appurtenant to a messuage, that courts of common law will consider the right to a pew. Crabb, in his Law of Real Property, says that there can be no personal property in a pew. That every man who settles as a householder has a right to call on the parish for a convenient seat. The doctrine was that the soil and freehold of the church was in the parson; that the use of the church and keeping it in repair was in the parishioners, and that the disposition of the seats belonged to the ordinary: *Boothby v. Baily*, Hobart 69.

There was no such thing as a sale or transfer of a pew. Being annexed by prescription to a messuage, it passed with the house to the tenant thereof for the time being, who had, *de jure*, the prescriptive right to the pew. 1 Hagg. Cons. 319.

Corven's Case, 12 Rep. 105 (Lord Coke), is probably the oldest case on this subject (1655). See also, the following cases: *Kenrick v. Taylor*, 1 Wilson 326 (1752); *Stocks v. Booth*, 1 Term Rep. 428 (1786); *Roger v. Brooks*, Id. 431; *Griffith v. Mat-*

thews, 5 Id. 296 (1793); *Mainwaring v. Giles*, 5 B. & A. 356, (1822); *Wyllie v. Mott*, 3 Eng. Eccles. Rep. 19 (1827); *Bryan v. Whistler*, 8 B. & C. 294 (1828); *Reynolds v. Monkton*, 2 Moo. & R. 384 (1841); *Hinde v. Chorlton*, Law Rep. 2 C. P. 104 (1866). In many of the English churches of the present day the seats are free, in others the pews are rented, and the old manorial customs and privileges are gradually becoming obsolete.

In this country there has been some discordance in the decisions of the different states. In the case of *Daniel v. Wood*, 1 Pick. 102, the plaintiff brought an action of trespass *quare clausum fregit*, to recover damages for the destruction of his pew, which had been demolished in the enlarging of the church. The court held that he could not maintain trespass, but that if he had suffered in his property, through the destruction of the old and the erection of the new meeting-house, he might maintain an action on the case to recover reasonable damages. That he had a qualified property in the pew, viz.: the exclusive right to occupy it for the purpose of attending public worship, which right was subject to the right in the parish (in which was the title to the ground and building) to take down and rebuild the meeting-house, and to make such alterations as the good of the society might require.

In *Gay v. Baker*, 17 Mass. 437, the plaintiff brought trespass against the defendant, as one of a committee appointed by the parish to enlarge the church, for the taking down of the plaintiff's pew. The court held, that although the property of the plaintiff is to be treated as real estate, it is not subject to the same principles of law as govern property in a farm. That the pew-owner can maintain trespass against any one who disturbs him in his seat, but that if the church is rebuilt and the pew destroyed in doing so, then, all the pew-owner can claim, is indemnity on just and equitable principles, and no more.

In *Howard v. First Parish, &c.*, 7 Pick. 138, the pew-owner brought an action on the case against the parish for pulling down a church and thereby demolishing his pew; but the court held that where a meeting-house is so old and ruinous that the jury may say it was necessary to take it down, then the pew-holder shall not be compensated; but otherwise, if the church is in good condition, or if the taking was a matter of expediency rather than of necessity.

In *Kimball v. Second Parish in Rowly*, 24 Pick. 349, it was held that property in a pew is real estate in Massachusetts, except

in the city of Boston, and may be transferred by all the modes of conveyance applicable to real estate, and with greater facilities for perpetuating the evidence of title.

In *Jackson v. Rounseville*, 5 Metcalf 127, it was held that trespass *q. c. f.* was the proper action for violation of the right of possession of a pew, and the court expressed the opinion that it was by no means certain that a religious society, constituted in the usual way, had the authority further than such as is tacitly conferred by acquiescence on the part of the congregation from a spirit of courtesy, to loan the use of houses of worship for objects and purposes in which the pew-owners have no interest or concern.

In the case of *Fisher v. Glover*, 4 N. H. 181, it appeared that the plaintiff's action was based upon a removal of the church to another locality which was more convenient to the whole congregation. The court held that although the grant of an exclusive use in a pew confers a right which is to be protected, that yet that right is acquired subject to the rights of the society to have the meeting-house in such place as will best accommodate the whole.

In *Kellog v. Dickinson*, 18 Vermont 266, which was an action to recover for the demolition of the plaintiff's pew, the court held that property in a pew partakes of real estate, and that the owner can maintain trespass *vi et armis*, if disturbed in his possession, and that he has the right to have the house used as a place of public worship, if it can be done, and if the parish abandons it, he is entitled to demand compensation. If, however, the church becomes wholly ruinous, there is no beneficial interest left in the pew-holder for which he can claim compensation. See also *Howe v. Stevens*, 47 Vermont 262.

In the case of *Church, &c., v. Wells's Ex'rs*, 12 Harris 251 (Penn.), it appeared that Wells had loaned money to the church, for the recovery of which this action was brought by his executors. The church pleaded set-off, under which the defendant claimed pew-rent from the death of Wells up to the time of trial. It was shown that his family had occupied the pew after his death, and had paid the rent regularly up to a certain date, and had then ceased paying, and that the rent was in arrears for a specified period, as pleaded by way of set-off. In delivering his opinion in the appellate court, the judge says, "A pew-right is not of such a character as to prevent an absolute sale of the church edifice, either by contract or by judicial process; by itself it was never known as a subject of taxation;

if the edifice burns down, the pew-right is gone; it does not prevent the society from tearing down and rebuilding the edifice, or from altering the whole interior arrangement of it; it does not authorize the pew-holder to change and decorate the pew according to his fancy, or to cut it down and carry it away; and it gives him no right to the ground on which it stands. It is, therefore, a right that is entirely peculiar, and yet it is a sort of interest in real estate. * * * It is, in its nature, scarcely divisible among heirs, and can scarcely be said to be the subject of an action of partition or ejectment, or of decree of sale by the Orphans' Court for the payment of debts. As property, therefore, it is so conditional and impermanent that it cannot be called real estate, and it must necessarily pass to the personal representatives. But in its very nature it could not pass to them for use, for they do not succeed to the opinions of the deceased. It passes merely for sale as part of the assets, and they sell it subject to its burdens, if the sale is not needed for creditors, the family may be allowed to hold it together, and if they do so, there is no one to charge the executor with a *devastavit* in not selling it." * * * "There can be no recovery for the rent accruing after his death, except so far as it can be obtained by the remedy provided by the church itself in the sale of the pew, or by a resort to those who actually occupied it, and such was the judgment of the court below."

In the state of New York the law on the subject has been somewhat unsettled. In the case of *Trustees of the First Baptist Church v. Bigelow*, 16 Wend. 28, an action of assumpsit was brought to recover the price of a pew. The defendant relied upon there being no writing binding upon him. The plaintiff contended that no writing was necessary, but the court held as follows: "Although the interest acquired in a pew in a church is a limited and qualified interest, it is, notwithstanding, an interest in real estate, and requires a writing to support it if the interest extends beyond a lease for one year."

See also *Baptist Church v. Witherill*, 3 Paige 302; *Shaw v. Beveridge*, 3 Hill 26; *St. Paul's Church v. Ford*, 34 Barb. 18. On subject of altering, rebuilding or removing church, see also *Vielie v. Osgood*, 8 Barb. 130; *Voorhies v. Presbyterian, &c.*, 17 Id. 103; *Cooper v. Trustees*, 32 Id. 222. And as to same in New Jersey, see *VanHouten v. McKelway*, 17 N. J. Ch. 126. See also *First Baptist, &c., v. Grant*, 59 Me. 250; *Proprietors of Union, &c., v. Rowell*, 66 Id. 400.

In the case of *Hatcheson v. Tilden, &c.*, 4 H. & McH. 279 (Md.), it appeared that the plaintiff was a candidate for the office of sheriff. The constitution of Maryland required, as a qualification, that the candidate should possess *real and personal property* within the state, above the value of 1000*l.*, at the time of being voted for. The plaintiff not having the requisite property, his counsel offered to give evidence of a right of the plaintiff to a pew in a church, as heir-at-law of his father, who had held the said pew; and he alleged that this pew was real property, which had fallen to the plaintiff by descent. But this was rejected by the court without argument.

But in the case of *Stoddert v. The Vestry, &c.*, 2 G. & J. 227, in which an action of assumpsit was instituted by the vestry against the appellant to recover the price of a pew, the plaintiff proved at the trial below, by one of the vestry, that he had himself acted as auctioneer, and had struck off the pew to Stoddert as being the highest bidder, and had at the time made a memorandum in pencil of the name of the purchaser and the price, which memorandum was delivered to the register of the vestry, who transcribed it in the record-book, and which memorandum was lost and could not be found. The defendant prayed the court to exclude the parol evidence as to sale of pew and purchase thereof by the defendant, but the court below declined to do so, and the verdict being against him, the defendant appealed. Upon appeal the court said: "The parol evidence offered of a sale of a pew was inadmissible, because it would have established a contract different from that contained in the lost memorandum. No parol evidence is admissible to add to or vary the memorandum." The memorandum having been shown to have been lost, it is difficult to understand the court's ruling upon any other theory than that it assumed a pew to be real property, and therefore as coming within the operation and effect of the fourth section of the Statute of Frauds.

In Louisiana, a pew is classed as real estate. In *the Matter of the Successors of Robert Gamble*, 23 La. Ann. 9, it appeared that Gamble died without heirs, either in the ascending or descending line. He gave by his will to his wife certain lots of ground and other specific property, and also gave her "all my personal property of whatever name or nature soever, intending this bequest to include everything of which I am now possessed, except real estate." He concluded the disposition of his property as follows: "I give and

bequeath unto my sister, Mary Gamble, all the remainder of my property, not hereby otherwise disposed of, of every name, nature and kind whatsoever." A pew which he owned at the time of his death, was treated by his executor as real estate, and assigned to Miss Mary Gamble. Mrs. Gamble, the widow, had claimed it as being personal property, and as belonging to her under the will, and appealed from the judgment awarding it to Mary Gamble. In its opinion, affirming the judgment of the lower court, the appellate court said: "The right to the use of a pew has been defined to be an incorporeal interest in real property. In a few of the states of this union, pews are considered as real estate; in others, as personal property. In the state of New York the precise nature of such property does not seem to be well settled. * * * *

"The pew, then, was properly assigned to Mary Gamble, as it is embraced by that clause of the will in which the testator declares, 'I give and bequeath to my sister, Mary Gamble, all the remainder of my property, not hereby otherwise disposed of, of every name, nature and kind whatsoever.'"

Washburne, in vol. 1, § 33, of his Law of Real Property, says: "Pews in churches are in some states declared by statute to be real, in others personal estate. In the absence of such statute, they partake of the nature of realty, although the ownership is that of an exclusive easement for special purposes, since the general property in the house usually belongs to the parish or corporation that erected it."

From the foregoing the following deduction may be drawn as to this class of property. That exclusive of all statutory provision on the subject, the ownership of a pew in a church gives the holder a qualified, and not an absolute property in the same. His right is exclusive so far as the full enjoyment and use of the pew for the purposes of divine service are concerned, and he may maintain an action of trespass or of case, according to circumstances, if disturbed in that use and enjoyment. This exclusive right is, however, to be exercised subject to the right of the church society to repair, rebuild, or remove the meeting-house, should the welfare of the whole body require it. It is not, strictly speaking, realty, but is an incorporeal interest in real estate, in the nature of an easement therein. The owner of the pew cannot alter or decorate his pew so as to make it differ from the other pews in the church, nor can he deal with it in a manner not consistent with the purposes for which pews are constructed, nor has he any title to the ground upon which it rests.

In the absence of state statutes on the subject, it would, upon the death of the owner, pass to his personal representatives as part of the assets of his estate, and in the Pennsylvania case above referred to, it was decided that no rent accruing after his death could be recovered from his estate, but that the remedy was *in rem* against the pew, under the church regulations, or by suit against the persons who had actually occupied it since his death. It so far partakes of real estate that a writing is necessary to support a transfer of interest in it. In the absence of local statutory exemptions of such property, there is no reason why an interest in a pew should not be seized and sold under an execution, as in the case of any other interest in lands, tenements and hereditaments.

In the case of the *Presbyterian Congregation of Erie v. Colt's Executors*, 2 Grant's Cas. 75, a judgment had been obtained against the plaintiff in error, and a *fi. fa.* issued and levied on the meeting-house and ground. The plaintiff in error thereupon filed a motion to set aside said levy, on the ground that the lot of land and meeting-house thereon, being property used for religious purposes, were not subject to levy and sale; which motion was overruled by the court below, and a writ of error thereupon sued out. The proceedings were affirmed by the higher court, which held that a church and the lot upon which it is erected are private property, and subject to levy and sale in the same manner as other private property. In the case in 12 Harris 251, above referred to, it was held that a pew right is not of such a character as to prevent an absolute sale of the church edifice, either by contract or by judicial process. The right, then, to seize and sell the greater, would clearly include the same course of procedure against the lesser tenure. The pew-holder has a usufructuary right which may be destroyed by a sale, or by fire, or by the action of time: *Freligh v. Platt*, 5 Cowen 494.

II. *Stalls in Markets*.—The law applicable to the character and nature of the property in market-stalls, is, so far as the writer has been able to discover, very scant. A number of decisions have been rendered upon the question of the extent of the power of a municipal corporation to establish and regulate markets, but with the exception of the Maryland decision, below referred to, he has been unable to find an express exposition of the nature and extent of the ownership of this class of property.

Dillon, in vol. 1 of his work on Municipal Corporations, says that if the title to the land purchased for the erection of a market-house

be taken by the municipal corporation in fee, no length of use of the same for a market will *dedicate* it for market purposes; and the markets may be abandoned or changed at the will of the council, and the land thus acquired and held be sold. And he further says that the right to establish a market includes the right to abandon it, or shift it to another place, when the public convenience demands it and of this the council is the judge.

In the case of *Wartman v. City, &c.*, 33 Penn. St. (9 Casey) 202, it appeared that the old market-house was about to be demolished under competent authority and new property purchased for the erection of a new market building. The plaintiff applied for a special injunction, contending that the city was a mere trustee for the farmers and victuallers, or country people, and bound to maintain the markets for their use at the places where they then were, and that the city had no authority to remove the market except with their consent. But the Supreme Court held that the council was but exercising a right which it possessed to remove the location of the market from one place to another, where the people would enjoy greater conveniences and where the accommodations would be better. That it was true that the persons bringing provisions to the market had a sort of interest in it, but not such an interest as entitled them to a voice in its regulation.

See also on same point, *Gall v. Cincinnati, &c.*, 18 Ohio (Critchfield) 563.

In the recent case of *Rose v. Mayor and City Council, &c.*, not yet reported except in 2 Md. Law Record 81, the question was as to the rights of owners of market-stalls, and the nature and extent of their tenure. The action was brought by the appellees to recover the amount of certain promissory notes given by the appellant for the purchase-money agreed to be paid for two butchers' stalls in one of the public markets of Baltimore city. At the public sale of the stalls in the market, the appellant had paid part of the purchase-money in cash, and had given these notes for the balance, and had accepted a receipt from the comptroller, describing the stalls and stating that they were sold subject to the ordinances then existing, or thereafter to be passed by the city regulating markets. The appellant at once took possession, and paid regularly the annual rent and license fee required to be paid. At the trial below, the defendant, afterwards appellant, contended that the appellees had sold to him

a larger interest or estate in the stalls than they were authorized by law to sell.

That the absence of a limitation as to the duration of the right which the appellant was to have in the stalls, made it a sale of the entire freehold, interest and estate of the corporation in the stalls, and that inasmuch as the corporation was required by law to hold the ground in trust for the purposes of a market, such sale was in contravention of that special trust, and therefore was made without legal authority, and that the corporation had transcended its authority. Upon the appeal taken by Rose, the Court of Appeals held as follows: "This contention results, as we think, from a misconception of the nature of the right or estate acquired by the purchaser of the stalls. The purchase of these stalls in a public market, like the purchase of a pew in a church, does not confer on the purchaser an absolute property, but a qualified right only. The right acquired is in the nature of an easement in, not a title to, a freehold in the land, and such right or easement is limited in duration to the existence of the market, and it is to be understood as acquired subject to such changes and modifications in the market during its existence as the public needs may require. The purchase confers an exclusive right to occupy the particular stalls, with their appendages, for the purposes of the market, and none other. If the owner be disturbed in the possession of the stalls, he may maintain case or trespass, according to the nature and circumstances of the injury, against the wrongdoer. But he cannot convert them to any other use than that for which they were sold, and in the use of them, he is required to conform to the regulations of the market as prescribed by the ordinances of the city. This is by analogy to the principles applied in respect to the rights of pew-holders, and in our opinion the analogy between those rights and the right acquired in the stalls is sufficiently exact to make the principles applicable in the one case, equally applicable in the other."

This interest or ownership in a market-stall may be seized under legal process, in the same way as other property of a debtor, and at the death of the owner a stall would go to his personal representatives.

Lots in cemeteries, will be considered in a succeeding number.

WM. C. SCHLEY.

BALTIMORE.